

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:)	CHAPTER 11
)	
EQUIPMENT ACQUISITION)	Case No. 09 B 39937
RESOURCES, INC.)	
)	Hon. Donald R. Cassling
Debtor.)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **April 4, 2017 at 9:30 a.m.**, or as soon thereafter as counsel may be heard, the undersigned will appear before the Honorable Donald R. Cassling, Bankruptcy Judge, or such other judge as may be sitting in his/her stead, in courtroom 619, 219 South Dearborn Street, Chicago, Illinois and shall then and there present the **PLAN ADMINISTRATOR'S MOTION TO APPROVE SETTLEMENT PURSUANT TO RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE WITH TD EQUIPMENT FINANCE, INC., SUCCESSOR BY MERGER TO TD BANKNORTH LEASING CORPORATION** at which time and place you may appear as you see fit.

Dated: March 10, 2017

Respectfully submitted,

WILLIAM A. BRANDT, JR., acting solely
in his capacity as the Plan Administrator for
Equipment Acquisition Resources, Inc.

By: J. Maxwell Beatty
One of his attorneys

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FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	CHAPTER 11
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EQUIPMENT ACQUISITION)	Case No. 09 B 39937
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**PLAN ADMINISTRATOR’S MOTION TO APPROVE SETTLEMENT
PURSUANT TO RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY
PROCEDURE WITH TD EQUIPMENT FINANCE, INC., SUCCESSOR BY MERGER
TO TD BANKNORTH LEASING CORPORATION**

William A. Brandt, Jr. (“**Brandt**” or the “**Plan Administrator**”), acting solely in his capacity as the Plan Administrator for the estate of Equipment Acquisition Resources, Inc. (“**EAR**” or “**Debtor**”), by his attorneys at Diamond McCarthy, LLP, hereby moves this Court pursuant to Federal Rule of Bankruptcy Procedure 9019 for an order approving the Settlement Agreement between Brandt and TD Equipment Finance, Inc., successor by merger to TD Banknorth Leasing Corporation (“**TDB**”). In support of this motion (the “**Motion**”), Brandt states as follows.

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409. Relief can be granted to Brandt under 11 U.S.C. § 105 and Rule 9019.

II. BACKGROUND

A. The Debtor

2. On October 23, 2009, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in this Court (the “Petition Date”). This Court approved the Debtor’s Second Amended Plan of Liquidation (the “Plan”) by Order dated July 15, 2010 [#322].

3. Pursuant to the terms of the Plan, the Debtor executed the Plan Administrator Agreement, naming Brandt as Plan Administrator of the Debtor.

4. The Plan expressly retained the Debtor’s Litigation Claims, as defined in Plan ¶1.43. Under the terms of the Plan and the Plan Administrator Agreement, Brandt has the responsibility and right to pursue litigation claims on behalf of the Debtor, including the claims against TDB.

B. TDB

5. Between July 5, 2007 and September 16, 2008, EAR and TDB entered a master lease agreement, together with all subsequent modifications, amendments, ancillary documents and associated schedules (the “Leases”).

6. TDB filed a proof of claim in EAR’s bankruptcy estate in the amount of \$8,431,212.60 (Claim No. 91).

7. On December 8, 2011, Brandt filed an adversary proceeding against TDB, case no. 11 A 2582, seeking the avoidance and recovery of certain transfers made by the Debtor. The adversary complaint alleges that TDB received payments of \$6,187,281.11 related to the leases from August 2007 through September 2009 (the “Transfers”). During the adversary proceeding, the Court entered an order dismissing claims relating to certain transfers totaling

\$2,827,054.84. The TDB adversary proceeding seeks the avoidance and recovery of the remaining \$3,360,226.27 in Transfers under 11 U.S.C. § 548(a)(1)(a), 11 U.S.C. § 547, 740 ILCS 160/5(a)(1), and 11 U.S.C. § 550.

8. TDB has denied the material allegations of the complaint and asserted affirmative defenses.

III. TERMS OF SETTLEMENT

9. With a view toward maximizing the recoverable value of Brandt's claims, in furtherance of broader efforts to facilitate the estate's distribution of funds, and to otherwise avoid the time, expense, and uncertainty of litigation, based upon his business judgment, Brandt seeks the approval of the Settlement Agreement and Mutual Release with TDB (the "**Settlement Agreement**").

10. Brandt, subject to this Court's approval, has agreed to settle the claims against TDB for a one-time payment of \$1,700,000.00, with mutual releases as set forth in the Settlement Agreement, a copy of which is attached hereto as **Exhibit A**. The Settlement Agreement also provides that TDB will withdraw its proof of claim and waive all rights that it may have to file a proof of claim in EAR's bankruptcy estate in the future.

IV. ARGUMENT

A. The 9019 Order

i. The Standard for Approval of Settlement Agreements

11. Compromise and settlement have long been an inherent component of the bankruptcy process. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1958) (citing *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)). Rule 9019 provides:

(a) COMPROMISE. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States Trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the Court may direct.

12. Compromises are favored in bankruptcy and public policy favors compromise because litigation “can occupy a court’s docket for years on end, depleting resources of the parties and the taxpayers while rendering meaningful relief elusive.” *In re Grau*, 267 B.R. 896, 899 (Bankr. S.D. Fla. 2001) (quoting *Matter of Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). “Approval of a settlement is committed to the court’s sound discretion.” *In re Commercial Loan Corp.*, 316 B.R. 690, 697 (Bankr. N.D. Ill. 2004). Brandt asks the Court to exercise its authority and discretion and, based on the standards for the approval of compromises under Rule 9019, approve the Settlement Agreement.

13. The paramount question in approving a bankruptcy settlement is whether the compromise is in the best interests of the estate. *E.g.*, *In re Andreuccetti*, 975 F.2d 413, 421 (7th Cir. 1992). The “linchpin” of this examination is “a comparison of the value of the settlement with the probable costs and benefits of litigating.” *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007). Factors that the Court should consider include “the litigation’s probability of success, complexity, expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets.” *Id.* (internal quotations omitted).

14. In conducting such an analysis, “a precise determination of likely outcomes is not required, since ‘an exact judicial determination of the values in issue would defeat the purpose of compromising the claim.’” *In re Telesphere Communications, Inc.*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994) (quoting *In re Energy Coop, Inc.*, 886 F.2d 921, 927 (7th Cir. 1989)). Instead, the court must determine if the “settlement falls within the reasonable range of possible litigation

outcomes.” *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d at 426. The standard is not met “only if a settlement falls below the low end of possible litigation outcomes.” *Id.*

ii. The Settlement Agreement is Fair and Equitable

15. Brandt has analyzed the claims against TDB and believes that the Settlement Agreement is reasonable and equitable considering all the relevant factors. In reaching the terms of the proposed settlement, Brandt compared the value of the settlements with the costs and benefits of continued litigation. Based on this analysis, Brandt believes that the Settlement Agreement is in the best interests of the estate.

1. Probability of Success in the Litigation

16. TDB has asserted multiple affirmative defenses, including the statutory good faith defense provided by the Illinois Uniform Fraudulent Transfer Act and 11 U.S.C. § 548(c). Considering the uncertainty and contingency involved in the litigation against TDB and the costs associated with continued litigation relative to the total value of the claim, the Settlement Agreement properly considers the probability of success for Brandt in litigation.

17. There is no guarantee that Brandt would succeed if the parties litigated the disputes that are the subject of the Settlement Agreement. Though Brandt is confident that he can prove his prima facie case, the estate will be required to expend additional resources in pursuit of the claims against TDB. The Settlement Agreement permits Brandt to avoid the continued costs of motion practice and trial, which would reduce the net benefit to the estate if Brandt is required to fully litigate this matter. Therefore, Brandt believes this settlement plainly falls within the reasonable range of possible litigation outcomes and represents the best outcome for the estate.

2. *The Complexity of the Litigation Involved and the Expense, Inconvenience, and Delay Necessarily Attending It*

18. Should the claims against TDB proceed to trial, there is no doubt that it would be expensive to litigate as the parties appear intent on vigorously backing their allegations. Therefore, Brandt has concluded that the Settlement Agreement is fair, reasonable, and in the interest of the Estate after weighing all relevant and material factors, including the strengths of the asserted claims and defenses.

19. The Settlement Agreement will facilitate a prompt and meaningful recovery for the estate, which further supports Brandt's belief that resolving these claims through settlement is in the best interest of the estate.

VI. CONCLUSION

20. After weighing all relevant and material factors, including the settlement amount, the strengths of the asserted claims and defenses, the costs and burdens of litigation, and the general uncertainty and risk of litigation, Brandt believes the Settlement Agreement is in the best interest of the estate.

WHEREFORE, Plaintiff, William A. Brandt, acting solely in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc., respectfully requests that this Court approve the Settlement Agreement with TDB, which is attached to this motion as Exhibit A, on the terms set forth above, enter the proposed Rule 9019 order, and provide such other and further relief as the Court deems appropriate.

Dated: March 10, 2017

Respectfully submitted,

/s/ J. Maxwell Beatty

One of the attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I, J. Maxwell Beatty, an attorney, certify that on March 10, 2017, I caused a copy of the **PLAN ADMINISTRATOR'S MOTION TO APPROVE SETTLEMENT PURSUANT TO RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE WITH TD EQUIPMENT FINANCE, INC., SUCCESSOR BY MERGER TO TD BANKNORTH LEASING CORPORATION** and related Notice to be served on all parties registered to receive notice by the CM/ECF System and that a true and correct copy of the Notice and Motion was served by regular United States Mail, first class, postage prepaid on all parties on the Service List attached hereto.

/s/ J. Maxwell Beatty

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Hewlett-Packard Financial Services
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Newark, NJ 07102-5310

Home Federal Savings Bank
c/o Joseph D. Roach
Briggs and Morgan P.A.
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IBM Credit LLC
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Oakbrook Terrace, IL 60181-4295

Ice Mountain
P.O. Box 52214
Phoenix, AZ 85072-2214

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21033 Network Place
Chicago, IL 60673-1210

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II – ICON EAR LLC III
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Cincinnati, OH 45223-2273

Northway State Bank
480 West Center Street
Grayslake, IL 60030-7827

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EXHIBIT A

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the "Agreement"), is made and entered between William A. Brandt, Jr. ("Brandt"), not individually but solely in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc. ("EAR") and TD Equipment Finance, Inc., successor by merger to TD Banknorth Leasing Corporation ("TDB"). Brandt and TD are each a "Party" and collectively they are the "Parties." The date of the Agreement shall be the date on which the last Party signs.

RECITALS

WHEREAS, between July 5, 2007 and September 16, 2008, EAR and TDB entered a master lease agreement, together with all subsequent modifications, amendments, ancillary documents and associated schedules (the "Leases"); and

WHEREAS, on October 23, 2009, EAR filed a bankruptcy petition pursuant to Chapter 11 of the United States Code (the "EAR Bankruptcy"), and that bankruptcy was given case no. 09 B 39937; and

WHEREAS, on July 15, 2010, the Court entered an order titled Order Confirming Debtor's Second Amended Plan of Liquidation, which named Brandt as the Plan Administrator; and

WHEREAS, TDB filed a proof of claim in EAR's bankruptcy estate in the amount of \$8,431,212.60 (Claim No. 91); and

WHEREAS, on December 8, 2011, Brandt filed a lawsuit (the "Lawsuit") titled Equipment Acquisition Resources, Inc. v. TD Banknorth Leasing Corporation, Case No. 11 A 02582, pending in the United States Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court"); and

WHEREAS, pursuant to the order of the court dated December 13, 2011, Brandt amended the complaint in the Lawsuit on December 28, 2011, substituting William A. Brandt, Jr., solely in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc. as the plaintiff in place of EAR; and

WHEREAS, pursuant to the order of the court dated September 28, 2012, Brandt filed his Second Amended Complaint on October 31, 2012; and

WHEREAS, pursuant to the court's order dated June 6, 2013, Brandt filed his Third Amended Complaint on July 3, 2013; and

WHEREAS, the Lawsuit alleges that, pursuant to the Leases, TDB or its predecessor received payments totaling \$6,187,281.11 from August 2007 through September 2009 (the "Transfers"); and

WHEREAS, the Lawsuit seeks the avoidance and recovery of the Transfers under 740 ILCS 160/5(a)(1) and 11 U.S.C. § 548(a)(1)(A), and 11 U.S.C. § 550; and

WHEREAS, TDB denies the material allegations of the Lawsuit and has asserted affirmative defenses; and

WHEREAS, TDB agrees not to initiate any further claims or lawsuits against any third party related to the Leases; provided however, that nothing shall limit any defense, affirmative defense, cross-claim or counterclaim available to TDB in any subsequent litigation involving the subject matter of the Leases or Lawsuit; and

WHEREAS, the Parties have agreed to resolve their dispute;

NOW THEREFORE, in consideration of the foregoing, the Parties intending to be legally bound by this Agreement agree as follows:

1. Recitals Incorporated. The Recitals listed above are incorporated into and made a part of this Agreement.

2. Settlement Payment. The Parties agree that, within fourteen (14) days of approval of this Agreement by the Bankruptcy Court and the provision of a fully-executed W-9 for the receipt of the funds, TDB shall make a payment of one million seven hundred thousand dollars (\$1,700,000.00) to William A. Brandt, Jr., as Plan Administrator for Equipment Acquisition Resources, Inc. (the "Settlement Payment").

3. Mutual Limited Release. Except for the enforcement of the terms and provisions of this Agreement, each of the Parties releases and forever discharges the other Party and its agents, successors, predecessors, assigns, subsidiary companies, parent companies, affiliates, trustees, beneficiaries, attorneys, employees, directors, insurers, trusts, including but not limited to grantor trusts, trustees, receivers, representatives and all other persons, parties, or entities affiliated with, associated with, or in any way representative of the other Party, of and from any and all loss, costs, claims, actions, lawsuits, administrative claims, arbitration claims, causes of action, demands, damages, or expenses of any type whatsoever, in law or in equity, imposed by contract, statute, common law or otherwise, whether or not known now, anticipated, unanticipated, suspected or claimed, fixed or contingent, direct or indirect, liquidated or unliquidated, accrued or unaccrued, irrespective of legal theory and whether damage has resulted from such or not, arising from or in any way related to EAR, the Leases, the Transfers or other transactions described in the Lawsuit.

4. EAR Bankruptcy Claims. TDB acknowledges that it filed a proof of claim in EAR's Bankruptcy. In addition to the releases set out above in Paragraph 3, TDB also releases and discharges EAR and Brandt from any and all liability for any and all of the following: (a) any claims involving, arising under, or related to matters identified in EAR's bankruptcy schedules; (b) any claims involving or arising under 11 U.S.C. § 502(h); and (c) any other proofs of claim that have been filed or could be filed by TDB in the EAR Bankruptcy. For the avoidance of doubt, TDB specifically agrees and acknowledges that it: (a) shall have no further

standing as a creditor or party-in-interest in the EAR Bankruptcy, and (b) shall have no right to file any proof of claim in EAR's bankruptcy based on this Agreement or the Settlement Payment or otherwise receive any distribution from EAR's bankruptcy estate. TDB further agrees that it shall file all necessary motions, notices, or other required documentation indicating it has withdrawn any proof of claim within fourteen (14) days of the approval of this Agreement by the Bankruptcy Court.

5. Warranties. Each of the Parties warrants and represents that:

- a. it has not heretofore assigned, subrogated, or transferred or purported to assign, subrogate, or transfer, to any person, firm, partnership, corporation or entity whatsoever any action(s) or cause(s) of action at law or in equity, suits, debts, demands, claims, contracts, covenants, liens, liabilities, losses, costs, accounts, expenses (including, without limitation attorneys' fees), or damages released in this Agreement; and
- b. it has full power and authority to execute and perform its obligations under this Agreement in all respects; and
- c. it has not relied upon the advice of any representative, agent, or attorney of any of the other Parties, as to the legal or other consequences which attach from the assent to the terms of this Agreement.

6. Court Approval. The Parties understand that this Agreement is subject to approval by the Bankruptcy Court. Accordingly, Brandt shall file an appropriate motion seeking approval of this agreement once the Parties have executed the agreement. In the event the Court in the EAR Bankruptcy declines to issue an Order approving this Agreement, or in the event any reviewing court reverses the entry of an Order approving this Agreement without remand and upon all appeals having been exhausted, this Agreement shall be null and void.

7. Dismissal of the Lawsuit. Within fourteen (14) days from the date when Brandt receives the Settlement Payment, Brandt and TDB shall execute and file a stipulation under Fed. R. Civ. P. 41 to dismiss the Lawsuit with prejudice and without costs to either party. TDB agrees to cooperate with Brandt as necessary to effectuate the dismissal of the Lawsuit.

8. Final Disposition. This Agreement is acknowledged to be a final and binding disposition of any and all claims by the Parties arising from or in any way related to the Transfers or the Leases described in the Lawsuit.

9. Waiver of Construction against Drafter. The Parties agree that this Agreement has been negotiated at arm's length among persons knowledgeable about the matters dealt with herein, and each Party participated in its drafting. Accordingly, any rule of law or other statute, legal decision, or common law principle which would require the interpretation of any ambiguities in this Agreement against the Party that drafted it is of no application and is expressly waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effectuate the intentions of the Parties. Notwithstanding the foregoing, if any part of this

Agreement is held by a court of competent jurisdiction to be illegal or contrary to public policy or otherwise unenforceable, such invalid part shall be deemed modified or eliminated to the extent necessary to make the remaining part enforceable.

10. Costs and Fees. The Parties agree to pay their own costs and attorneys' fees associated with the disputes described in this Agreement.

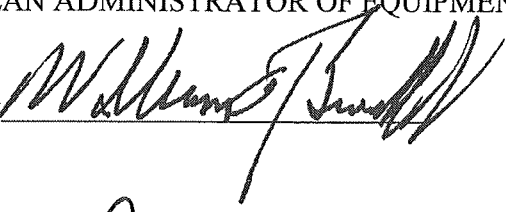
11. Choice of Law. The Parties hereto agree that the terms of this Agreement shall be interpreted and construed pursuant to the internal laws of the State of Illinois without regard to choice of law.

12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. Facsimile, PDF, or copied signatures shall be as effective as original signatures.

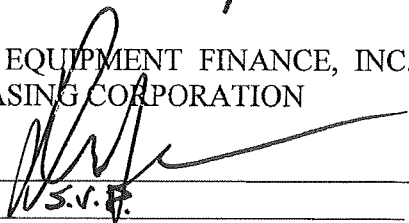
13. Entire Agreement. This Agreement is the complete, final, and exclusive agreement between and among the Parties with respect to the subject matter hereof, and supersedes any and all prior agreements, negotiations, and understandings, whether written or oral. The Parties acknowledge and agree that they have had an opportunity to read the Agreement and that no promises, agreements, statements, or representations not expressed in this Agreement have been made or are being relied upon by any Party to this Agreement. This Agreement may not be amended, supplemented, modified, or waived, in whole or in part, except by a written instrument signed by all of the parties hereto.

IN WITNESS WHEREOF, the Parties have executed this document on the dates set forth below:

WILLIAM A. BRANDT, JR., NOT INDIVIDUALLY BUT SOLELY IN HIS CAPACITY AS
PLAN ADMINISTRATOR OF EQUIPMENT ACQUISITION RESOURCES, INC.

By  Date: 08 MARCH 2017

TD EQUIPMENT FINANCE, INC., SUCCESSOR BY MERGER TO TD BANKNORTH
LEASING CORPORATION

By  Date: 3/9/17
Its: S.V.P.
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